# ZONING AND LOW COST HOUSING

*White v. Cincinnati*
*101 Ohio App. 160, 138 N.E. 2d 412 (1956)*

The Cincinnati Metropolitan Housing Authority[1] selected as a site for the development of low cost housing a tract of thirteen and one-half acres owned by the plaintiffs and located in the City of Cincinnati. Without having purchased or acquired the tract the Authority requested the City to re-zone it from "industrial A" to "residence C." The plaintiffs' tract had been zoned for industrial use for over thirty years. No substantial change in the condition of the tract had occurred, other than the establishment of several industries in the surrounding area. The tract itself was not in an unsafe or unsanitary condition, but a shortage of safe, sanitary housing did exist in Cincinnati. The Authority claimed such re-zoning was a prerequisite to obtaining federal financial assistance for the proposed housing project. The City rezoned the property "for no other reason or purpose than the Authority' request." The plaintiffs sought to have the ordinance declared void and its enforcement enjoined. The Court of Appeals held that the existence of a shortage of safe, sanitary housing in the city generally did not justify the rezoning of the tract. The ordinance was therefore void and its enforcement enjoined. The Court suggested that re-zoning might be justified if the Authority acquired title to the tract.

Ever since the Supreme Court of the United States sustained the comprehensive zoning plan of the Village of Euclid, literally thousands of communities have accepted zoning as the means to assure an orderly, physical pattern of growth.[2] In providing sites for the erection of low cost housing and the redevelopment of existing housing areas, zoning has been an indispensable tool in the hands of the city planners and housing authorities. Today, finding appropriate housing sites is a difficult undertaking. The difficulty arises because many communities have been underzoned for multiple housing.[3] The lack of available sites has necessitated the re-zoning of residential and industrial areas. The present case illustrates the essential relationship that exists between zoning and housing and redevelopment. Here, the Authority had located a site it considered suitable. However, it appeared to find itself in

[1] This is a body politic existing under the laws of the state. OHIO REV. CODE §3735.50.

[2] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In the preceding year the Ohio Supreme Court upheld a comprehensive plan for the City of Cincinnati under the home rule provision of OHIO CONST. art. XVIII, §3. Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925). This is the landmark case in Ohio upholding the right of a municipality to regulate the use of the property by its police power.

[3] Seigel, *Relation of Planning and Zoning to Housing Policy and Law*, 20 L. AND CONTEMP. PROB. 419, 421 (1955).

the dilemma that to secure Federal assistance required a re-zoning, yet the court prohibited re-zoning until the tract was purchased.

The statement of the case and the opinion of the Court do not clearly show the fact findings upon which the decision was based. At one point, the Court stated that the zoning ordinance was passed in compliance with the request of the Authority "and for no other reason." It is apparent that the failure of the City to exercise its discretion and delegate its responsibility for decision making to the Housing Authority would constitute arbitrary action.[4] Any action based solely upon a "mere request" is an abandonment of legislative responsibility and nullification of such action is clearly justified. However, it is highly improbable that upon the request of the Authority the City blindly and without any consideration re-zoned the area for multiple housing. Such complete abdication of responsibility is difficult to visualize. The ultimate decision of the Court is justified if no discretion was exercised by the City. But, other than the quoted remark there is no indication that this was the basis for finding the ordinance fatally arbitrary.

It might be assumed that the Court found that this particular tract was not suitable to be restricted to "residence C" use. The zoning ordinance in this case would be discriminatory and unreasonable as applied to the plaintiffs if there existed no valid reason for the zoning classification. The justification for re-zoning would appear to rest on either the need of the immediate area or the need of the community as a whole.

Zoning regulations imposed upon property must, of course, bear a reasonable and substantial relation to the accomplishment of some purpose fairly within the scope of the police power.[5] If no such relationship exists, it should be declared void. As the first step in determining the reasonableness of the ordinance, the Court looked to the immediate area. It found that the tract had been zoned industrial for thirty years, that the surrounding conditions were unchanged, and that the tract was not unsafe or unsanitary. These findings seem to substantiate that there was no need in the immediate area to justify the re-zoning. This, however, does not rebut the presumption of reasonableness. The Court had to take the further step and find that no legitimate reason existed for the

[4] A municipal council cannot delegate to a municipal officer power to decide legislative matters, since chosen by the people to legislate, the public is entitled to their judgment and discretion. State *ex rel.* Strigley v. Woodworth, 33 Ohio App. 406, 169 N.E. 713 (1929).

[5] A zoning ordinance is valid if there is a substantial relation to the public health, safety, morals, or general welfare. Pritz v. Messer, *supra* note 2; Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 148 N.E. 842 (1925); Pearce v. Youngstown, 100 Ohio App. 22, 135 N.E. 2d 430 (1954); inhibition to use property for business and industrial use to the serious detriment of owner where there was no relationship to the general welfare was held unconstitutional in Mehl v. Stegner, 38 Ohio App. 416, 175 N.E. 712 (1930).

reclassification.[6] Until such a finding, the Court had no basis to declare the ordinance arbitrary and unreasonable. The ordinance might have been arbitrary if under these conditions neither the plaintiffs nor other private persons could economically develop the area for residential use.[7] The difficulty with this analysis is that the Court never specifically stated that the area was unsuitable for multiple housing development.

Comments such as "no comparable trend toward residential use" indicate that the Court found the tract was *more* suitable for industrial purposes. If this was the reasoning of the Court, it violates one of the basic tenets of judicial power. It is an established rule that a court cannot substitute its judgment for that of a legislative body.[8] This area has always been marked "off-limits." The fact that industrial development of this tract is diverted from its natural course by re-zoning is not sufficient to invalidate the ordinance.[9] True, the property in this case might be worth more if industrial. In fact, it might be more readily adaptable for industrial purposes. But, the best use with relation to the over-all community need is a matter of judgment which rests basically with the City. There is a vast difference between the Court finding the area more suitable for industrial and finding it unsuitable for residential. Only the latter justifies judicial interference.

Even though the condition of the immediate area did not justify rezoning, the question remained of whether the general community need justified it. The greatest weight for the Court's decision was that the re-zoning was not to relieve a condition in the immediate locality, but to relieve a condition in some other area of the City. The Court con-

[6] Restricting a trailer camp to residential uses for no public reason is in contravention of both the Ohio and Federal Constitutions, Kessler v. Smith, 142 N.E. 2d 231 (Ohio App. 1957); see also Clifton Hills Realty Co. v. Cincinnati, 60 Ohio App. 443, 21 N.E. 2d 993 (1938); State *ex rel.* Kuhlman v. Cincinnati, 32 Ohio L. Abs. 325, 18 Ohio Op. 405 (1940). The legislative body has the presumption that the enacted law is reasonable and this must be clearly rebutted before a finding of arbitrariness can be entered, Mehl v. Stegner, *supra* note 5.

[7] The Supreme Court in Nectow v. Cambridge, 277 U.S. 183 (1927) held a zoning ordinance invalid upon finding "that no practical use can be made of the land in question for residential puposes because, among other reasons related, there would not be an adequate return on the amount of any investment for the development of the property." State *ex rel.* Euverland v. Miller, 98 Ohio App. 283, 129 N.E. 2d 209 (1954); Murdock v. City of Norwood, 25 Ohio L. Abs. 233, 9 Ohio Op. 399 (1937).

[8] The legislative act must control unless there has been a clear abuse of power, Youngstown v. Kahn Bros. Bldg. Co., *supra* note 5, or the ordinance is unreasonable, State *ex rel.* Strigley v. Woodworth, *supra* note 4; Central Trust Co. v. Cincinnati, 62 Ohio App. 139, 23 N.E. 2d 450 (1939); see also *supra* note 2.

[9] A rezoning of an industrial area to residential to preserve it for the further expansion of the University of Minnesota was upheld in American Woods Products Co. v. City of Minneapolis, 21 F. 2d 440 (D. Minn. 1927); Village of Euclid v. Ambler Realty Co., *supra* note 2; State *ex rel.* Kuhlman v. Cincinnati, *supra* note 6. The extent of impairment will be tested by the facts of the individual case, Curtiss v. Cleveland, 74 Ohio L. Abs. 499, 130 N.E. 2d 342 (1955).

sidered this to be a taking from one for the benefit of another without compensation. Thus, it appears the Court used a geographical criterion to determine reasonableness. Such an approach runs headlong into the concept of comprehensive zoning in the *Euclid* case.[10] The basis for justifying zoning as established by the Supreme Court in that case is the effect of the land use upon the community as a whole and not just the immediate area. Comprehensive means all-inclusive. City planners must look to the over-all community needs and cannot limit themselves to the existing conditions within a segregated area. Here, the Court as a matter of fact did find a shortage of safe, sanitary housing existed in Cincinnati. Assuming re-zoning served no purpose in the immediate area, it did not follow it served no purpose in relation to the city-wide problem of inadequate housing. It is implicit from the fact that zoning must bear a relation to the general welfare that its effect upon the whole community must be considered.[11] The Ohio courts have stated that a person buying and using property has the right to rely on the rule of law that classification will not be changed unless required by the good of the whole.[12] The condition of the immediate area has not been recognized as the controlling factor in determining the reasonableness of the use of the police power. To restrict zoning to the needs of the immediate area effected would hobble the City's ability to plan for a better balanced community. It appears in the present case that the Court refused altogether to consider whether the need of the community justified the re-zoning. Since the consideration of "remoteness" was erroneous, this left only the finding that nothing in the immediate area demanded a re-zoning. This again suggests that the Court was actually substituting its judgment as to the proper use of this particular tract. If so, the constitutional test of unreasonableness was never met and the decision was unjustified.

The Court made strong reference to the fact that the Authority had in no way committed itself to purchase and develop the area. The contemplative nature of the plan would be of extreme importance if the City or the Authority were condemning this tract of land. It is fundamental that property may not be taken unless there is a public

---

[10] *Supra* note 2; State *ex rel.* City Ice and Fuel Co. v. Stegner, 120 Ohio St. 418, 166 N.E. 226 (1929).

[11] See *supra* notes 2, 5, and 6. In the case Pearce v. City of Youngstown, *supra* note 5, the immediate area had not changed and people had purchased and improved the property in reliance on such existing zoning. The court held that the plaintiff had failed to show the low-cost housing project had no relation to the general health, safety and welfare and therefore the presumption of reasonableness was not overcome.

[12] Clifton Hills Realty Co. v. Cincinnati, *supra* note 6; State *ex rel.* Kuhlman v. Cincinnati, *supra* note 6; Cleveland Trust Co. v. Village of Brooklyn, 92 Ohio App. 351, 110 N.E. 2d 440, *appeal dismissed,* 158 Ohio St. 258, 108 N.E. 2d 258 (1952).

necessity.[13] Because of the increasing demands upon government, the modern concept of "public purpose" has been kept elastic and made adaptable to changing conditions.[14] With the increased growth of our cities, the proposition that slum clearance is a public purpose is unquestioned. A rehabilitation program is also one for which the power of eminent domain may be exercised.[15] The power is used not only for demolishing slums,[16] but also in acquiring property not located in the slum area.[17]

There exists authority in the Ohio case of *Henle v. City of Euclid* that the right to freeze property solely upon a possible future use is without foundation.[18] In that case the city tried to re-zone the area to preserve its status in the event it decided to take it as a site for a freeway. It was evident that it would be an unjust taking of property rights to compel one to pay taxes without benefit of use until the land was appropriated. This situation was litigated again in *Sun Oil Co. v. City of Euclid*,[19] when the city tried to appropriate the land after its efforts to re-zone had failed. The Court enjoined the appropriation as an "abortive attempt to acquire title." No power existed for the exercise of eminent domain by reason of the tentative nature of the plan. In short, no need existed.

The plan in the present case, as in *Sun Oil*, was merely in contemplation and this is the antithesis of a public need. You cannot need something you have not decided you want. The Court was correct in

---

[13] Pontiac Improvement Co. v. Cleveland Metropolitan Park Dist., 104 Ohio St. 447, 135 N.E. 635 (1922); followed and modified by State *ex rel.* Bruestle v. Rich, 159 Ohio St. 13, 110 N.E. 2d 778 (1953); St. Stephen's Club v. Youngstown Metropolitan Housing Authority, 160 Ohio St. 194, 115 N.E. 2d 385 (1953); State *ex rel.* Kearns v. Ohio Power Co., 163 Ohio St. 451, 127 N.E. 2d 394 (1955).

[14] The complexity of society demands increased governmental interference, Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398 (1933); The court stated in Village of Euclid v. Ambler Realty Co., *supra* note 2, that ". . . while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of operation." 272 U.S. at 387.

[15] Berman v. Parker, 348 U.S. 26 (1954) which included not only slums but blighted areas that tend to produce slums. The court stated, ". . . miserable and disreputable conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle." 348 U.S. at 32; State *ex rel.* Bruestle v. Rich, *supra* note 13; Johnson, *Constitutional Law and Community Planning*, 20 L AND CONTEMP. PROB. 199 (1955).

[16] See note 15 *supra*. There is no restriction against later selling condemned land to private persons. Cincinnati v. Vester, 281 U.S. 439 (1930); Berman v. Parker, *supra* note 15; State *ex rel.* Dalton v. Land Clearance Authority, 270 S.W. 2d 44 (Mo. Sup. Ct. 1954).

[17] St. Stephen's Club v. Youngstown Metropolitan Housing Authority, *supra* note 13.

[18] 97 Ohio App. 258, 118 N.E. 2d 682 (1954).

[19] 164 Ohio St. 265, 130 N.E. 2d 336 (1956).

its statement of eminent domain law. But, this was completely irrelevant. This case did not involve a "taking" under eminent domain, but rather a "re-zoning" under the police powers. The test to be applied was the suitability of the land and its relationship to the general welfare of the community.[20] The existence of the tentative plans of the Authority to develop the area were of no consequence. The absence of a need required by eminent domain law has no effect upon the reasonableness of a zoning ordinance. If the re-zoning would have been valid in the absence of any contemplated taking, then it is valid regardless of any contemplated taking.

It might be noted that the Court did not appear to question the right of the Authority to ultimately acquire the property. Under our present law, some doubt may be raised if an appropriation is valid when the taking is not coupled with slum elimination.[21]

The entanglement with eminent domain law arose from the Court's failure to disassociate the zoning from the housing project. This was partly fostered by the Authority's contention that re-zoning was required to qualify for Federal aid. As illustrated, zoning laws could impair the efficacy of a housing authority in carrying out its project. A reclassification of use before a condemnation may be void because the land is unsuitable for private development. At the same time, property cannot be taken for a purpose which is prohibited by an applicable zoning ordinance. When it is impossible to use the land for the intended purpose, there can be no "need" and hence no taking. The Housing Law has provided a means for a housing authority to extricate itself from this apparent dilemma. Under the law, a city is authorized to enter into an agreement with a housing authority for the "planning, replanning, zoning and re-zoning" of land with relation to housing projects.[22] This type of contract arrangement is widely employed. *St. Stephen's Club v. Youngstown Metropolitan Housing Authority* is a good example of the effectiveness of such an agreement.[23] In this case an appropriation was made pursuant to an agreement of the City to re-zone the acquired area for multiple housing. In view of the agreement it was held to be no defense to the appropriation that the existing zoning excluded the intended use for which the land was appropriated. Such an agreement, as authorized under the Ohio Housing Law,[24] serves not only to carry

[20] State *ex rel.* Synod of Ohio v. Joseph, 139 Ohio St. 229, 39 N.E. 2d 515 (1942); see also *supra* notes 5 and 6.

[21] St. Stephen's Club v. Youngstown Metropolitan Housing Authority, *supra* note 13; People *ex rel.* Gutknecht v. Chicago, 414 Ill. 600, 111 N.E. 2d 626 (1953); Oliver v. Clairton, 374 Pa. 353, 98 A. 2d 47 (1953).

[22] Seigel, *supra* note 3.

[23] *Supra* note 13; Blumenschein v. Housing Authority of Pittsburgh, 379 Pa. 566, 109 A. 2d 331 (1954), upheld a housing project and the concomitant cooperation agreement over objections that the present zoning would be interfered with.

[24] OHIO REV. CODE §3735.52(E), (H).

out the purpose of the statute, but also assures performance on the part of the city to conform land use in accordance with housing projects. Once these contracts have been accepted, the city cannot refuse to cooperate and exercise its powers to effect the completion of the project.[25] In the case of *Borek v. Golder*, involving such a contract, the New York court commented that the acute need of housing and the trend toward multiple units is so generally accepted that a change of zoning to permit such development is not sufficient to void the appropriation once the site appears to be wise and sound.[26]

The assurance of re-zoning fulfills the condition of local responsibility required under the Federal Act.[27] Actual re-zoning, as apparently contended by the Authority, is not a prerequisite to receiving Federal loans or subsidies. Undoubtedly, the cooperation law is an important provision. The Authority in the present case could have avoided its difficulties by making an agreement with the City to re-zone, applying for Federal aid, and then trying to appropriate the property.

In the final analysis, it appears that the real concern of the Court was that the City was using its zoning power for the ulterior purpose of holding down the value of the property until final appropriation. Obviously, by freezing the status quo it could prevent the expansion of industry which would increase the value of the land.[28] This clearly would be an abusive use of the police power to allow the City to restrict property use in contemplation of possible appropriation.

The problem of land value illustrates the conflicting interests that exist between the landowner and the city. The landowner wants to protect his property interests. He has a constitutional right to make use of his land so long as he does not endanger the public welfare. This right can only be yielded to the extent it is necessary to serve the greater

---

[25] Under recent case law it would seem that there is no longer room to doubt that a successor city legislative body is bound by the action of its predecessor in entering into a cooperation agreement. Housing Authority v. Los Angeles, 38 Cal. 2d 853, 243 P. 2d 515 (1952); State *ex rel.* Helena Housing Authority v. City Council of Helena, 125 Mont. 592, 242 P. 250 (1952); Borek v. Golder, 190 Misc. 366, 74 N.Y. Supp. 2d 675 (1947).

[26] *Supra* note 25. It must be borne in mind that the legal relation of housing to zoning is not precisely the same as that of any private building project. The facility of zoning change is grounded in a statutory grant of power "to plan or replan, zone or rezone any part of such state public body," and "to do all things necessary or convenient to aid and cooperate. . . ." OHIO REV. CODE §3735.52(D), (F). Here the suitability of the zoning may depend greatly on the ownership, i.e. the public who has funds to develop and expects little monetary return. Cf. *supra* note 7.

[27] 42 U.S.C.A. §§1451-1455.

[28] Henle v. City of Euclid, *supra* 18. This is particularly important as to the compensation that will be paid upon condemnation. An owner is entitled to be paid only the value of the property in its condition and situation *at the time it is taken*, Olson v. United States, 292 U.S. 246 (1934).

interests of the community.[29] Yet, the landowner may abuse this right by speculating on the future appropriation by the city. By undertaking expansion prior to appropriation, the land value is enhanced to the detriment of the taxpayers. On the other hand, the city wants to limit public expenditures by preventing the value of the land from rising. Some price must be paid by the landowner when the police power is properly used. Yet, there should be some assurance that the landowner's rights will not fall prey to the self interest of the city.[30] The possibility that the City was attempting to suppress land value is fortified by the Authority's subsequent offer to allow the plaintiffs to enter evidence of the value of the land "as though it had not been rezoned." Although such an attempt would result in an approbrious use of power, this alone does not justify throwing out the zoning ordinance. To reach a decision on this ground entails going behind the face of the ordinance to the legislative motive. The use of such a subjective test is outside the scope of judicial review. Regardless of the ulterior motive, the Court could only consider if the re-zoning of the land was reasonable from the standpoint of the immediate neighborhood and/or the community as a whole. If this were the situation, one must sympathize with the position in which the Court found itself. Nevertheless, this is an example of the classic statement that hard cases make bad law. If we are to protect our legislative-administrative process, the courts must be held to an objective test even though the ulterior motive behind an enactment sometimes appears questionable.

The final decision could be explained on three grounds. One, that the land was unsuitable for multiple housing. Since the Court never specifically found the area unsuitable, it might be assumed that it unjustifiably interfered by substituting its judgment for that of the City. Second, that the tract was remote from the deprived areas. Such a criterion is erroneous under the doctrine of comprehensive zoning and would not justify the ultimate decision. Third, that the City rezoned to hold down land value. Since the ulterior motive behind legislation is beyond the scope of the judicial consideration, this could not justify the Court's interference.

Housing and redevelopment have made great strides during the last decades and if it is to meet the future demands it must be controlled but not impaired. Such might be the result if the opinion of the present case is not limited in its application.

*Joanne Wharton*

---

[29] See *supra* note 2.

[30] The use of cooperation agreements might enable the city to appropriate the land more readily. This would aid the city's interests and protect the landowner from giving up his property rights without compensation. Zoning should not be used as a guise for eminent domain, Kessler v. Smith, *supra* note 6.